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No. 88-1883

In The Supreme Court of the United States

OCTOBER TERM, 1988

AETNA LIFE INSURANCE CO.,
Petitioner,

v.

FRANCISCO L. BORGES, TREASURER OF THE STATE OF CONNECTICUT, and STATE OF CONNECTICUT,
Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 ("ERISA") preempts Connecticut's unclaimed property statute, Conn. Gen. Stat. § 3-64a, as it applies to issued but uncollected checks and drafts for employee benefits provided through ERISA plans which are charged for such benefits in accordance with Aetna's presented basis accounting procedure?

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STATEMENT OF THE CASE

In addition to the facts stated by the petitioner, the following facts, stipulated by the parties, are relevant to the disposition of the case. These facts pertain to Aetna's intricate accounting procedures used to calculate premiums charged to ERISA plans. The parties agreed that Aetna relies on its method of premium computation as a matter of its own choosing, rather than as a result of any legal obligation. Petitioner's Appendix (Pet. App.) at A44, ¶ 9; A46, ¶¶ 15, 16.[1]

Aetna's contention that under section 514(a) ERISA preempts Connecticut's unclaimed property law with regard to the checks and drafts it issues in payment of ERISA benefits requires an explanation of this accounting method. The District Court, relying on the parties' joint stipulation, found the following facts.[2] Using a method of group insurance pricing called "experience rating," Aetna

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[1] On this point the District Court specifically noted the following: By the terms of its contracts with policyholders, Aetna has discretion to set the amount of credits applied toward premiums; on occasion, Aetna has negotiated the amount of premiums and credits with ERISA plans; and it has made adjustments to premiums in order to prevent policyholders from terminating or cancelling their policies. Pet. App. at A19.

[2] The District Court decision is reported as *Aetna Life Insurance Co. v. Parker*, 692 F.Supp. 94 (D. Conn. 1988); however, for the convenience of the Court, reference to that decision is made through references to Petitioner's Appendix, pages A16 to A33, inclusive, wherein that decision is reprinted.

bases premiums for the ensuing year on several factors,[3] the most important of which is the amount actually paid in claims to members of that group during the pending year. Pet. App. at A18; A44, ¶ 8. Aetna does not include a claim from the previous year in its experience rating until the claim payment draft has cleared banking channels – a practice known as "presented basis accounting." Pet. App. at A18; A45, ¶ 12; A46, ¶ 17. Aetna uses the opposite method, "issued basis accounting," in which it charges drafts to the appropriate plan at the time it issues the drafts, only for pharmacy and repetitive payment claims. Pet. App. at A46, ¶ 18; A52, ¶ 41. Most insurers, in contrast to Aetna, use "issued basis accounting" for the ERISA and non-ERISA plans they insure. Pet. App. at A18-A19; A46, ¶ 19.

To cover the contingency in which Aetna's payment does not clear banking channels during the policy year, Aetna sets aside a reserve fund for payment of these claims based upon the group's claims history. Pet. App. at A19; A45, ¶ 10. The size of this reserve fund is also a factor in a plan's experience rating and will thus affect insurance premiums. Pet. App. at A45, ¶¶ 11, 12.

When an ERISA plan cancels or terminates an Aetna insurance policy, Aetna continues to pay claims submitted under the plan in the usual manner for two additional

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[3] Some of these factors, other than claims clearing banking channels, *see* text *infra*, are: a contingency for unrecoverable losses (Pet. App. at A45, ¶ 11); administrative charges; an amount for current reserves for incurred but unrecorded claims less an amount for prior required reserves; and profit charges. Pet. App. A45-46, ¶¶ 11, 12, 13.

years. Pet. App. at A19; A48, ¶ 29. Two years after the plan ends, Aetna returns the reserve funds to the plan, deducting a 2 percent residual for unclaimed drafts that the claimant may subsequently present. Pet. App. at A19; A46, ¶ 14. Once a final accounting has taken place, Aetna cannot charge a cancelled or terminated plan for drafts that a claimant subsequently presents for payment. Pet. App. at A48, ¶ 30.

REASONS FOR DENIAL OF THE PETITION

1. The question presented by the petitioner asks to what minimal extent does Connecticut's unclaimed property law have an impact on Aetna's accounting system. This is an esoteric issue of limited precedential value. The facts of this case turn on the unique and discretionary accounting method Aetna employs to charge premiums to the ERISA plans it insures. Petition (Pet.) at 3;[4] *See* the detailed accounting method outlined in the joint stipulation of facts, Pet. App. at A44-A46, ¶¶ 12-17; A48, ¶ 29. The parties stipulated that most insurers do not use the "presented basis" accounting method relied on by Aetna. Pet. App. at A46, ¶¶ 19, 20. The Court of Appeals relied on the following stipulated facts regarding the operation of Aetna's accounting methods:

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[4] The decision below is reported as *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142 (2d Cir. 1989); however, for the convenience of the Court, references to that decision will be made to Petitioner's Appendix, pages A1 to A15, inclusive, wherein the decision is reprinted.

> The premium that Aetna charges to employers is based on each employer's "experience rating" – that is, it is related to the cost of providing benefits to the employees of that company in previous years. The more benefits paid out under a plan, the higher the premium will be for the employer.
>
> Not infrequently, after Aetna approves an employee's claim for benefits and issues a draft on an Aetna account to pay the claim, the employee fails to present the draft for payment. The draft then remains on Aetna's records as outstanding. . . .
>
> Aetna generally calculates the experience rating of employers on the basis of checks presented for payment ("presented basis" accounting) rather than on all checks that have been issued ("issued basis" accounting). . . .
>
> Most other insurers in Connecticut use issued basis accounting. To the extent that issued basis accounting may lead to higher premiums, Aetna enjoys a competitive marketing advantage over its competitors.

Pet. App. at A2 to A3.

Thus, any cost that ultimately may be passed on to ERISA plans through the operation of Connecticut's unclaimed property law is directly caused by Aetna's discretionary accounting procedures. Furthermore, the Court below was correct when it characterized the economic impact of Connecticut's law on the plans as "not substantial enough, however, to persuade us that this is the type of law Congress intended to preempt." Pet. App. at A12. "[I]ndirect economic impact alone is not sufficient." Pet. App. at A14.

2. The decision below does not conflict with any other federal or state court decision on the issue of ERISA preemption of state unclaimed property or escheat laws. On the contrary, there is consistency and unanimity on this issue. As Circuit Judge Newman noted, speaking for the Court, the Michigan Court of Appeals has ruled that the State of Michigan's escheat law was not preempted by ERISA. *Attorney General v. Blue Cross & Blue Shield*, 168 Mich. App. 372, 424 N.W.2d 54 (1988). Pet. App. at A4. There are no other reported decisions involving state unclaimed property or escheat laws and ERISA preemption.

Petitioner manufactures a conflict between the circuits when it claims *Blue Cross & Blue Shield of Florida, Inc. v. Department of Banking & Finance*, 791 F.2d 1501 (11th Cir. 1986) is inconsistent with the Second Circuit's decision in this litigation. In the Eleventh Circuit case, Florida's escheat law was held preempted, *not by ERISA*, but by a totally distinct federal statute, 5 U.S.C. § 8902(m)(l) (1982), dealing with a contractual provision in federal health benefits contracts.

Also, the Florida and Connecticut cases arise in different contexts. The Eleventh Circuit's scope of review was confined to the examination of an administrative record. The Eleventh Circuit was concerned whether a federal agency's determination of preemption was reasonable and not whether that position was actually correct in the first instance, as was the case in the Second Circuit's decision. In its ruling, however, the Eleventh Circuit specifically recognized, as did the Second Circuit here, the limiting parameters of ERISA preemption set forth by this Court in *Shaw v. Delta Airlines, Inc.*, 463 U.S.

85 (1983), to wit, that some state laws may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law "relates to" the ERISA plan. *Blue Cross & Blue Shield of Florida, Inc. v. Dept. of Banking and Finance*, 791 F.2d at 1505. *See also Aetna Life Insurance Co. v. Borges*, Pet. App. at A12 ("[W]e think that the impact of Connecticut's escheat law on ERISA benefit plans is too tenuous, remote, and peripheral to require preemption under Section 514(a)."). The Eleventh Circuit opined that as to its preemption finding, "the opposite conclusion might also be reasonable." *Blue Cross & Blue Shield of Florida, Inc. v. Dept. of Banking and Finance*, 791 F.2d at 1506.

3. The Court of Appeals reached a correct and fair decision. It aptly observed that ERISA does not address the situation involved in this case; that is, ERISA neither prescribes any particular procedure for handling ERISA benefits that are awarded but uncollected, nor does it specify a time limit for honoring such claims. Pet. App. at A4-A5. Noting this, the Court applied two decisions of this Court. It considered the general test for preemption of state laws which embody the traditional exercise of state power. Such laws are "not superceded by a federal act unless that was the clear and manifest purpose of Congress." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). Pet. App. at A5. The Court also relied on the rule that some state laws can have a minimal or remote effect on ERISA plans yet not be superceded by ERISA. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n. 21 (1983), citing *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 1181, 1121 (2d Cir. 1979). Pet. App. at A7. *See also Rebaldo v. Cuomo*, 749 F.2d 133, 138 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

Within that framework, the Court of Appeals considered the three relevant areas in ERISA preemption analysis. First, it found that Connecticut's unclaimed property statute, Conn. Gen. Stat. § 3-64a, falls squarely within the class of laws recognized as historic police powers of the states. Escheat of abandoned property is such an area of traditional state authority. *Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541, 547 (1948).[5] Pet. App. at A12.

Realizing that the traditional police power aspect of the state law is not sufficient by itself to survive preemption, the Court's second area of inquiry was the economic impact, if any, of the Connecticut statute on ERISA plans. Pet. App. at A10-A13. Although there is a limited economic impact here, it is caused solely by Aetna's voluntarily selected method of accounting which Aetna uses for pricing its insurance products. Thus, the economic impact of section 3-64a is solely indirect and, as the Court noted, not substantial enough to indicate that it is that type of law Congress intended ERISA to preempt.

Lastly, the Court considered the impact of the state law on the administrative functions of ERISA plans. Pet.

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[5] Federal courts have held that state laws involving other areas of traditional state control survive ERISA preemption; *e.g., Mackey v. Lanier Collections Agency & Service, Inc.*, 108 S.Ct. 2182 (1988) (state garnishment laws); *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 1181 (2d Cir. 1979) (state domestic relations statute); *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985) (state hospital cost containment statute).

App. at A10-A11. Reviewing the facts of the case, the Court correctly found that the application of the Connecticut statute does not affect the calculation of ERISA benefits, the processing of payment or disbursing benefits, all areas that are precluded by state law. *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 9 (1987). Section 3-64a only comes into play *after* the ERISA plan has performed all of these vital administrative functions; the state statute clearly has no effect upon, and does not interfere with, the initial calculation and disbursement of ERISA benefits. Pet. App. at A11 n. 3.

Petitioner claims section 3-64a provides an alternative cause of action to recover ERISA benefits due under the terms of an ERISA plan in violation of section 502(a) of ERISA. Pet. App. at A15-A18. Acknowledging section 502(a) is the exclusive vehicle for ERISA plan beneficiaries and participants to recover benefits due under the terms of ERISA plans, *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 54 (1987), the court below correctly observed that section 3-64a "does not provide a civil action governing the issuance of drafts in the first instance," which is the intended gravamen of an action under section 502(a). Pet. App. at A15. Section 3-64a solely insures delivery of the ERISA draft many years after its issuance.[6]

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[6] The Connecticut General Assembly recently passed Subst. Senate Bill No. 1064. This bill, if approved by the Governor, would relieve the Treasurer of his obligation to escheat abandoned property which he has held in a custodial capacity for many years. *See* section 4. The actual escheatment of any funds held by the Treasurer would be purely discretionary, potentially providing access to such property in perpetuity.

Petitioner's argument under section 502(a) is therefore inapposite and erroneous.

The Court of Appeals was well aware that this Court's analysis of Georgia's generally applicable garnishment law under ERISA's preemption provision in *Mackey v. Lanier Collections Agency & Service, Inc.*, 108 S.Ct. 2182 (1988), was not upheld on the ground that the law's effect on ERISA plans was tangential. The Second Circuit merely cited *Mackey*, however, as "an example of a state statute with an indirect effect on ERISA plans that the Court did not find inconsistent with ERISA." *See* Pet. App. at A9 n. 2. This analysis is in total accord with this Court's prior decisions. *See Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n. 21 (1983). *See also Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985); *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979).

Furthermore, the court correctly applied the criteria used by this court in *Mackey*. The Connecticut statute "does not single out or specially mention ERISA plans of any kind." *Mackey, supra*, at 2186. The Connecticut statute does not "expressly refer[] to – indeed, solely appl[y] to – ERISA employee benefit plans." *Mackey, supra*, at 2185. Section 3-64a does not focus specifically on ERISA plans or benefits; it applies to lost or abandoned property generally.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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of the State of Connecticut,
and State of Connecticut

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